APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

THE DELAWARE & HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON & MAINE R.R. Co., Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor, Intervening Defendants.

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,
WESTERN MARYLAND RAILWAY COMPANY,
Intervening Plaintiff.

Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp.

I. The Trustees of the Central Railroad of New Jersey (CNJ) having represented in their motion "that they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" and having stipulated in open court that, while reserving the right to assert that the order of the Interstate Commerce Commission should contain protective conditions for the benefit of CNJ they will not ask that the Appendix G conditions in favor of other carriers be set aside, their motions to be relieved from the requirements of our Memorandum Order of July 3, 1967, insofar as that order requires them to file any amended complaint on or before July 17, 1967, to file a brief by August 8, 1967, to file reply briefs by September 12, 1967, and to bring the action as to them to final hearing on September 18, 1967, is granted.

II. Boston and Maine Corporation having represented to this Court that its "primary interest is that the Penn-Central merger actually occur and not be so long delayed that it fails of consummation," its motion to withdraw its complaint as an intervening plaintiff and to be realigned as an intervening defendant is granted.

III. The motion of the City of Scranton and Milton J. Shapp, intervening plaintiffs, for a stay of further proceedings or in the alternative to permit dismissal of their complaint without prejudice is denied, for reasons indicated in our Memorandum Order of July 3, 1967. The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems. Taking note of the Memorandum sur Motions of Defendant and Intervening Defendants for a Stay issued by the District Court for

the Middle District of Pennsylvania in Borough of Moosic et al. v. United States of America et al., Civ. No. 10054, on July 13, 1967, this Court will grant the Borough of Moosic and the City of Pottsville leave to intervene in these actions as plaintiffs if application accompanied by a complaint is made on or before August 2, 1967. The time of the City of Scranton and Shapp to file a supplemental complaint is similarly extended. In the event of such intervention or the filing of such a supplemental complaint pleadings responsive thereto shall be filed on or before August 12, 1967. The schedules set forth in our Memorandum Order of July 3, 1967, shall be complied with in all other respects. The hearing scheduled for September 18, 1967, will begin at 9:30 A.M. at a courtroom to be assigned.

In accordance with the suggestion made by counsel for the Interstate Commerce Commission, we place the various plaintiffs and intervening plaintiffs on notice that they are responsible for seeing to it that the court is furnished with the portions of the record they deem relevant to the issues they desire to raise. We shall expect the Commission to cooperate fully in this regard.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants.*

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
and READING COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD
CORPORATION, *Plaintiff.*

v.

UNITED STATES OF AMERICA, *Defendant.*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Memorandum on Motion for Injunction.

The United States of America and the Interstate Commerce Commission have moved this Court to enjoin

(1) the Norfolk and Western Railway Company from taking and further action in Civil Action No. 67-C-51-R, *Norfolk and Western Ry.* v. *United States,* before the United States District Court for the Western District of Virginia; and

(2) the City of Scranton and Milton J. Shapp from taking any further action in Civil Action No. 10054, *Borough of Moosic et al. v. United States,* before the United States District Court for the Middle District of Pennsylvania,

pending final determination of the instant actions by this Court.

For reasons indicated in our Memorandum Order of July 3, 1967, and in our order of today's date denying the motion of the City of Scranton and Shapp for a stay of 66 Civ. 2860 or for leave to dismiss their intervening complaint in that action without prejudice and on the basis of the authorities cited in the Memorandum in Support of the Motion, we entertain no doubt of the power and propriety of granting the relief sought by the United States and the Commission against them insofar as this relates to issues that can be litigated in the action in this court in which they have intervened, and we would do this if there were any evidence of need. However, the District Court for the Middle District of Pennsylvania has stayed proceedings in that court in Civ. No. 10054 until October 1, 1967, or further order of the court, and before that time we shall either have heard these parties in 66 Civ. 2860 or, if they should choose not to prosecute their intervening complaint, will have dismissed it with prejudice.

The portion of the motion asking us to enjoin the City of Scranton and Shapp from prosecuting so much of Civ.

No. 10054 in the Middle District of Pennsylvania as relates to the inclusion order, and the N&W from prosecuting Civ. No. 67-C-51-R in the Western District of Virginia raises a closer question. While we have no desire to assume additional burden, we must agree with the United States and the Commission, as the District Court for the Western District of Virginia also appears to do, that the "inclusion" case is sufficiently interrelated with the "merger" case that the public interest would be best served by their being handled by a single court of first instance, which is able to entertain both.[1] We agree also that the few days priority in time of the N&W's action in the Western District of Virginia with respect to the inclusion order over the D&H's action in this court in which the B&M has intervened, although relevant, is not conclusive in determining what

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[1] This is sufficiently evidenced by the N&W's motion that we enjoin the merger pending final determination of both the merger action and the inclusion action. In our Memorandum Order of July 3, 1967, we indicated that if we found the merger order valid our determination whether or not to enjoin the merger pending final determination of the inclusion proceeding might well depend on the nature and substantiality of the objections to the inclusion order—a problem in which the aggravated plight of the New Haven, see Judge Anderson's memorandum of July 11, 1967, may be of great importance. If we are seized of the inclusion action, we shall not have the embarrassment of being obliged to predict the views of another court. Also, as made clear by the Erie-Lackawanna's petition for reconsideration to the Commission in the merger case, the lack of a capital indemnity provision, a point that may well come before us in the merger case, is important only if N&W's objections to the inclusion order are sustained. Again an important basis for the Commission's rejection of N&W's principal objection to the inclusion order, namely, that this should be deferred pending consideration of its merger with C&O-B&O, was that such a postponement would further delay the Penn-Central merger, this ground would appear more weighty to a court which had satisfied itself of the validity of that merger than to one unfamiliar with it. We cite these simply as examples, not as an all inclusive list.

district court should review an order of the Interstate Commerce Commission. Compare Eastern Air Lines, Inc. v. C.A.B. 354 F. 2d 507, 511 (D.C.Cir.1965). While the N&W's winning the race would normally be a sufficient reason for deferring to the District Court for the Western District of Virginia, with the D&H and the B&M having the right to intervene there, if the inclusion order stood alone, this may not be so when review of the inclusion order in this court, equally feasible in light of our grant of the motion of the United States and the Interstate Commerce Commission to join the N&W, would have the advantage of bringing the merger order and the closely related inclusion order before the same court. With only questions of law at issue and with an appeal as of right to the Supreme Court the considerations that usually favor allowing the plaintiff that has won the race to the courthouse to retain his victory lose much of their force. Indeed, the Amended Pre-Trial Order of the District Court for the Western District of Virginia made clear that the continuance of the N&W's action "shall not be construed to preclude any party from applying to the District Court for the Southern District of New York for an injunction restraining the other parties from the further prosecution of this action."

However, here again we see no sufficient reason for now deciding whether we could or should grant the injunction that is sought. The District Court for the Middle District of Pennsylvania has stayed the action there as we have indicated, the two judges of the District Court for the Western District of Virginia who were present at the hearing on July 11 and signed the Amended Pre-Trial Order of July 14, 1967 were of the view that the issues in Civil Action No. 67-C-51-R should be litigated in this court, and our order of even date has provided for a hearing at what appears to be the earliest practicable time.

We shall therefore leave the motion for an injunction undecided, with leave to the United States or the Interstate

Commerce Commission to bring it on for further hearing on five days notice if occasion therefore should arise.

HENRY J. FRIENDLY
U.S.C.J.

RICHARD H. LEVET
U.S.D.J.

EDWARD WEINFELD
U.S.D.J.

26 July, 1967

APPENDIX B

Federal Rules of Civil Procedure

Rule 41. Dismissal of Actions.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 66-2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*.

Complaint of Intervening Plaintiffs Pennsylvania Communities

I.

Intervenors, Borough of Freedom and City of Scranton, hereinafter termed "Pennsylvania Communities", are located in the Commonwealth of Pennsylvania.

Intervenors were participants in the proceedings before the Interstate Commerce Commission known as Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co-Merger-New York Central R. Co.*, decided April 6, 1966, as modified by report and order upon reconsideration served September 19, 1966.

II.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this Court is conferred by, United States Code, Title 28, Sections 1336, 1398, 2321-2325, inclusive; Interstate Commerce Act (49 U.S.C. Section 1, et seq. and particularly Section 17(9); the Fifth Amendment of the Constitution of the United States; and Section 10 of the Administrative Procedure Act (5 U.S.C. Section 1009).

III.

The venue of this action is in this Court, pursuant to the provisions of United States Code, Title 28, Section 1398,

referred to above, because plaintiff Erie-Lackwanna Railroad Company is a corporation maintaining its principal office at 250 Park Avenue, New York, N. Y., located within the jurisdiction of this Court.

IV.

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

V.

The proceedings before the Interstate Commerce Commission, in which the report and order herein complained of were made, and which orders are hereby sought by intervening Pennsylvania communities to be enjoined, set aside, suspended and annulled, embrace the merger of the New York Central Railroad Company into the Pennsylvania Railroad Company, reported in Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, decided April 6, 1966 and served April 27, 1966, together with the report and order of the Commission upon reconsideration decided September 16, 1966 and served September 19, 1966.

The report and order of the Interstate Commerce Commission, annexed to the complaint of plaintiff Erie-Lackawanna Railroad Company as Exhibit A, as modified as to the effective date by subsequent orders of the Commission, copies of which are attached to the complaint of the Erie-Lackawanna Railroad Company as Exhibits B, C, and D, are adopted herein by reference pursuant to Rule 10(c) of the Federal Rules of Procedure.

VI.

The report and order of the Interstate Commerce Commission upon reconsideration decided September 16, 1966

and served September 19, 1966, attached as Exhibits 1 and 2 of the supplemental complaint of the Baltimore and Ohio Railroad Company, et al., dated September 20, 1966, and are incorporated herein by reference pursuant to Rule 10(c) of the Federal Rules of Procedure.

VII.

The above reports and orders of the Interstate Commerce Commission, annexed to the complaint of plaintiff Erie-Lackawanna Railroad Company as Exhibit A, and annexed to the supplemental complaint of The Baltimore and Ohio Railroad Company, et al., as Exhibits 1 and 2, are erroneous, unsupported by substantial evidence and without rational basis and violative of the applicable statutes and violative of due process. Among other things, the Commission:

(a) erroneously and inconsistently, in fact and in law, construed the statutory requirement of Section 5(2)(b) of the Interstate Commerce Act with respect to the definition and application of the "public interest" stated therein, having primarily employed the test set forth by the Transportation Act of 1920, rather than the standards enacted by the Transportation Act of 1940, and subsequent legislation, and particularly, affirmed that a reduction of tax receipts and loss of employment to railroad workers residing in intervening plaintiff communities cannot be considered in determining whether the merger is or is not in the public interest;

(b) erroneously failed to give appropriate consideration to current reports, information and statistics with respect to the income and prospects for the Pennsylvania Railroad Company and the New York Central Railroad Company, such current changed conditions are so substantial in nature as to alter the report approving the merger and to require that the order of the Commission be annulled and set aside;

(c) failed to give proper consideration to, and to make the requisite findings as to, the impact of the merger upon

employees of carriers other than those employed by the Pennsylvania Railroad Company and by the New York Central Railroad Company, as is stipulated in Section 5(2)(c)(4) of the Interstate Commerce Act, the public interest requirement of Section 5(2)(b) of the Interstate Commerce Act, The National Transportation Policy and by numerous federal enactments subsequent to 1940 relating to national employment goals such as the Employment Act of 1946 (15 U.S.C. Section 1021), Manpower Development and Training Act of 1962 (42 U.S.C. Section 2571) and Appalachian Regional Development Act of 1965 (40 U.S.C. App. 2)

(d) failed to impose employment protection conditions for employees of carriers by railroad, other than those employed by the Pennsylvania Railroad Company and New York Central Railroad Company, as is required by Section 5(2)(f) of the Interstate Commerce Act;

(e) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company, if required to continue as independent railroads, could not keep pace with their common carrier obligations;

(f) erroneously and unsupported by substantial evidence found that the Pennsylvania Railroad Company and New York Central Railroad Company have a persistent incapacity to produce profits from railroad operations;

(g) erroneously failed to give proper weight to the corporate financial statements of the Pennsylvania Railroad Company and New York Central Railroad Company as consolidated with their subsidiaries, in passing upon the transaction;

(h) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger with respect to non-railroad subsidiaries and activities which may be embraced within the antitrust im-

munity conferred by Section 5(11) of the Interstate Commerce Act;

(i) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger by reference to the relevant product and geographic markets;

(j) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger by reference to the *carrier* and *market* competition within the railroad industry and between the Pennsylvania Railroad Company and New York Central Railroad Company;

(k) failed to fully evaluate the evidence and make requisite findings with respect to the interlocking directorates, combined purchasing powers, and reciprocity between shippers and carriers which would result from the proposed merger in view of the provisions of the Sherman Act, the Clayton Act and the Federal Trade Commission Act;

(l) erroneously, unsupported by substantial evidence, contrary to the National Transportation Policy, and contrary to Section 5(2)(b) of the Interstate Commerce Act, failed to make adequate findings with respect to the impact of the proposed merger upon the national defense and upon the postal service;

(m) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company, merged, would have the resources to withstand the competition of the Chesapeake & Ohio-Baltimore & Ohio system and the Norfolk & Western-Nickel Plate system, whereas alone, and not merged, the Pennsylvania Railroad Company and New York Central Railroad Company could not keep pace with their common carrier obligations.

(n) erroneously and unsupported by substantial evidence made findings with respect to the prospective financial con-

dition and future traffic of the Pennsylvania Railroad Company and New York Central Railroad Company;

(o) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company have shown that their annual savings from the merger will exceed $80 million after about eight years.

(p) erroneously and unsupported by substantial evidence found that the prospects clearly import that the merger will benefit rather than harm the Commonwealth of Pennsylvania.

(q) erroneously required the inclusion of the New York, New Haven and Hartford Railroad Company in the transaction in approving the merger without proper evaluation of the burden to be assumed by the merged system and indirectly by the public presently served by the Pennsylvania Railroad Company and New York Central Railroad Company, in violation of the Interstate Commerce Act;

(r) erroneously and unsupported by substantial evidence, found that the merger would have the effect of substantially increasing the fleet of equipment available to shippers;

(s) erroneously, unsupported by substantial evidence, and contrary to the requirements of the Interstate Commerce Act, permitted the Erie-Lackawana Railroad Company, The Delaware and Hudson Railroad Corporation and Boston and Maine Corporation to petition for inclusion in the merger;

(t) erroneously and beyond its statutory authority, by Appendix G, made possible in some instances, indefinite suspension of rates with the result that under the operation of Appendix G, rates might be suspended for a period longer than provided by Section 15(7) of the Interstate Commerce Act;

(u) erroneously and beyond its statutory authority, contrary to the National Transportation Policy and the antitrust laws, curtailed the right of the public to the benefit of competition between railroads concerning rates which are otherwise lawful and within the zone of reasonableness, but which would divert or tend to divert traffic from routes participated in by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation or Boston and Maine Corporation.

VIII.

The above report of the Interstate Commerce Commission is erroneous and violative of due process and the Administrative Procedure Act in that the Commission among other things:

(a) stated that its decision is based on the major issues involved, yet did not specify which issues were major in its 91-page report;

(b) adopted findings and conclusions which were inadequately set forth with particularity or enumerated by the hearing examiners in their report, to the extent that the Commission did not "modify or reject," thereby failing to set forth the findings and conclusions upon which the decision is based with sufficient clarity;

(c) failed to reopen the proceedings for the purpose of introducing the speech of witness Stuart T. Saunders, Chairman of the Pennsylvania Railroad Company, and for rehearing, based upon radically revised methods for operating the proposed merged company, and the availability of new merger studies;

(d) failed to reopen the proceedings and grant a further hearing for the purpose of amending the official notice taken of the pending proceedings in Finance Docket No. 21510, *Norfolk & W. Ry. Co. and New York, C. & St. L. Ry. Co. Merger* and Finance Docket Nos. 23832-3, *Norfolk & West-*

ern Railway Company-Merger-The Chesapeake & Ohio Railway Company, in violation of Section 7(d) of the Administrative Procedure Act (5 U.S.C. 1006(d));

(e) failed to reopen the proceedings and grant a further hearing with respect to the protective conditions imposed in Appendix G of the report prior to permitting the merger to become effective.

IX.

The deficiencies of the report and order specified in Paragraphs VII and VIII above would, if the order is not permanently enjoined, annulled and set aside, operate to the substantial damage and irreparable injury to intervening plaintiff communities, and that intervening plaintiffs are without an adequate remedy at law.

X.

WHEREFORE, intervening plaintiffs respectfully pray:

1. That in accordance with Section 2284(3) of Title 28, United States Code, the orders of the Interstate Commerce Commission complained of in this suit be temporarily restrained and stayed from taking effect until the hearing and determination by a three-judge court.

2. That a court constituted as required by the U. S. Code, Title 28, Sections 2284 and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said court as constituted and convened shall hear and determine this suit.

3. That the court of three judges issue an interlocutory injunction staying and suspending the operation of said orders of the Interstate Commerce Commission pending final hearing and determination of this suit.

4. That the court of three judges,, upon final hearing of this suit, enter a decree permanently suspending, enjoin-

ing, setting aside, and annulling the said orders of the Interstate Commerce Commission complained of herein.

5. That intervening plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

Respectfully submitted,

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Dated: September 27, 1966